SEP 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 348

VICTOR RAINER,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute and Regulation Involved	2
Statement of Case and Argument	4
Conclusion	7

TABLE OF CASES

Armand v. United States, 136 C. Cls. 339	6
Taylor v. United States, 131 C. Cls. 387	6
Stringer v. U. S., 90 F. Supp. 375, 379	6

STATUTES AND OTHER CITATIONS

5 U.S.C. 863	2
28 U.S.C. 1255	2
Section 22.204, Civil Service Regulations	3, 5

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Carl L. Shipley, Alex Akerman, Jr., and Samuel Resnicoff on behalf of Victor Rainer pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above captioned case on June 11, 1958, granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's Petition.

A. OPINION BELOW

The opinion of the court below is reported at page 1a of the Appendix hereto.

B. JURISDICTION

The judgment sought to be reviewed was entered on June 11, 1958. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U. S. C. 1255. Petitioner contends that this petition raises important questions of federal law which have not been, but should be, settled by the Supreme Court.

C. QUESTIONS PRESENTED

1. Is the purported removal of a preference eligible from the federal service valid where the veteran is not kept in an active duty status during the notice period?

2. Has a preference eligible received adequate written notice of his proposed removal from the federal service where the Agency accelerates the effective date of the proposed removal?

D. STATUTE AND REGULATION INVOLVED

Section 14 of the Veterans' Preference Act of 1944, as amended, 58 Stat. 387, 61 Stat. 723, 5 U. S. C. 863, provides in pertinent part as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written

notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends.

Section 22.204 of the Civil Service Regulations is pertinent to a decision in this case and provides as follows:

> Status of employee during notice period. Whether the employee is given thirty (30) full days' advance notice under section 22.201, or less than thirty (30) full days' notice under paragraph (b) of section 22.202, he shall be retained in an active duty status during such notice period. However, in any case of a proposed adverse action, the employee may be placed on annual leave without

his consent when the administrative office does not consider it advisable from an official standpoint to retain him in an active duty status during the period of advance notice. When an employee is not placed on annual leave and the circumstances are such that his retention in an active duty status may result in damage to Government property, or may be detrimental to the interest of the Government or injurious to the employee, his fellow workers or the general public, the employee may be temporarily assigned to duties in which these conditions would not exist or he may be placed on leave without pay with his consent: *Provided*, That in an emergency case requiring prompt suspension of an employee, the employing agency may suspend him for not more than thirty (30) days. The employee shall be given written notice of the proposed emergency suspension at least twenty-four (24) hours in advance. The reasons for not retaining an employee in an active duty status shall be made part of the record. Such reasons shall be reviewed by the Commission in the event that the employee subsequently appeals from the final decision reached by the administrative officer.

E. STATEMENT OF CASE AND ARGUMENT

Petitioner is a veterans preference eligible with civil service status, who brought suit in the Court below to recover pay from August 17, 1956 to September 23, 1957, on the basis of an alleged unlawful separation from the Military Sea Transportation Service (Atlantic), Department of the Navy, Brooklyn, New York.

On July 17, 1956, petitioner was served with a notice of proposed removal for failure to obey the order of a superior and upon the further ground that petitioner had been notified of a ten day suspension (later reduced to 5 days). The notice stated that the effective date of the proposed removal would be on

or about 31 August, 1956, but not sooner than 30 days from the receipt of the notice. The notice provided that during the notice period petitioner would be carried in a work status. He was not carried in an active duty status during the entire notice period but was suspended from July 30 to August 2, 1956. On August 13, petitioner was notified by the agency that he would be removed from his employment effective August 17, 1956. On that date he was removed.

1. By Failing to Keep Petitioner in An Active Duty Status During the Notice Period the Agency Failed to Comply With Section 14 of the Veterans Preference Act.

The Veterans Preference Act requires thirty days written advance notice before removal of a preference eligible. Civil Service Regulation 22.204, issued pursuant to the Veterans Preference Act, requires that the veteran, with exceptions not pertinent here, be kept in an active duty status during this period. The Second Civil Service Region in the appeal of petitioner noted the failure of the Agency to keep petitioner in an active duty status during this period. It attempted to excuse this procedural error on the ground that the suspension resulted from a prior infraction and was not related to the current charge. In arriving at this decision the Civil Service Commission completely overlooked the fact that this prior infraction was a part of the charges in the notice of proposed removal and that in the final notice of removal the Agency stated this prior infraction was taken into consideration in arriving at a decision in the matter.

Petitioner contends that under Section 14 he is entitled to remain on active duty during the entire thirty day notice period. In this contention, he is supported, at least in part, by two decisions of the Court of

Claims, *Armand* v. *United States*, 136 C. Cls. 339 and *Taylor* v. *United States*, 131 C. Cls. 387. In these cases the veteran was placed on annual leave without his consent during the notice period. The Court allowed recovery for the time on annual leave. In the Taylor case the Court said:

> "The Act says that 'no permanent or indefinite preference eligible * * * shall be discharged * * * and the person whose discharge * * * is sought shall have at least 30 days' advance written notice'. This means, we think that he shall have 30 days' notice in advance of his being separated from the payroll. The regulation of the Civil Service Commission quoted above would deprive the preference eligible of this right. It would permit his separation from the payroll eo instante. This is in conflict with the Act and is, therefore, invalid".

We believe that this statement is in keeping with the spirit of the Veterans Preference Act. We contend, however, that proper application of the reasoning would be to hold the attempted removal void.

2. By Accelerating the Effective Date the Agency Voided the Notice of Proposed Removal.

On August 13, 1957, twenty seven days after the date of the notice of proposed removal the Agency accelerated the effective date of removal from on or about August 31, 1956 to August 17, 1956. The Act requires at least thirty days notice. *Stringer* v. *U. S.*, 90 F. Supp. 375, 379, holds "Section 14 contemplates two separate notices—a notice of proposed adverse action and a notice of proposed decision." We believe that Congress intended that the veteran was entitled to a definite time to answer the charges and put his house in order. We do not believe that the Courts should

approve the Agency playing a cat and mouse game with the veteran of first telling him he would be removed on or about August 31 and on August 13 advising him that he was to leave on August 17. Such action, it is contended, voided the original notice.

CONCLUSION

WHEREFORE, the premises considered, petitioner prays that his petition for a writ of certiorari be granted.

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